Supreme Court, U. S.
FILED
MAY 13 1977
MICHAEL RODAK, JR., CLERK

No. 76-1130

In the Supreme Court of the United States

OCTOBER TERM, 1976

LOUIS JAMES DESALVATORE, a/k/a
LOUIS PIZZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that his sentence on a guilty plea to a narcotic charge violated due process.

Petitioner was convicted on his guilty plea in the United States District Court for the Eastern District of New York of conspiring to possess and distribute narcotics, in violation of 21 U.S.C. 812, 841(a) and 841(b)(1)(A). He was sentenced to ten years' imprisonment to be followed by a special parole term of seven years. The court of appeals affirmed *per curiam* without written opinion (Pet. 22-23).

Petitioner was charged, together with two co-defendants and a third person who had died, in a seven-count indictment consisting of one conspiracy count and six substantive counts. Petitioner alone was charged in all

seven counts; the other defendants were charged only with conspiracy and with one or two substantive offenses. Petitioner was also named in four of the six overt acts of the conspiracy count while each of the other defendants was named in only two acts.

Petitioner's guilty plea was the product of a plea bargain pursuant to which the prosecutor agreed to take no position on his sentence. Prior to sentencing, petitioner submitted a pre-sentence memorandum which disputed a number of statements in the presentence report prepared by the probation department and in general attempted to minimize his participation in the events that were the subject of the indictment (A. 32a-39a).[1] The memorandum urged that, on the basis of the representations therein, probation would be the most appropriate sentence (A. 38a-39a), and petitioner's attorney argued orally that the act to which petitioner pleaded guilty was "an isolated thing" and that "the sentence should reflect this particular act and this act alone and the fact that he is a first offender" (A. 19a).

Over petitioner's objection (A. 18a, 25a), the prosecutor undertook to rebut the allegations in the presentence memorandum; he also called the court's attention to evidence at the trial of petitioner's co-defendants[2]—at which the sentencing judge had presided—which contradicted the memorandum's allegations and indicated that petitioner was the prime participant in the criminal events (A. 19a-22a, 24a). This evidence consisted primarily of 16 tape recordings. In pronouncing sentence, the court indicated

[1]"A." refers to the appendix filed in the court of appeals.

[2]One co-defendant was convicted and sentenced to six months' imprisonment; the other was acquitted.

that it had not been particularly influenced by the prosecutor's presentation but rather by the evidence at the trial of the co-defendants, which disclosed that petitioner had played a leading role in the commission of a serious offense. The court also took into consideration the fact that petitioner had twice previously been charged (although in one instance not tried and in the other acquitted) with narcotics offenses and hence should have been warned to refrain from involvement in the narcotics trade (A. 27a-30a).

Petitioner's argument that the sentencing procedure deprived him of due process is without merit. As the presiding judge of the court of appeals stated,[3] the prosecutor did not violate his agreement not to take a position by answering the statements made to the trial court on petitioner's behalf. The prosecutor promised only that he would not make a sentence recommendation, and, unlike the prosecutor in *Santobello* v. *New York*, 404 U.S. 257, he did not do so. As the presiding judge also observed, the trial court could properly consider the total offense, not merely the single count to which petitioner pleaded guilty, and could consider the evidence produced at the trial of petitioner's co-defendants. See 18 U.S.C. 3577; *Williams* v. *New York*, 337 U.S. 241, 247; *Williams* v. *Oklahoma*, 358 U.S. 576, 584; *United States* v. *Doyle*, 348 F. 2d 715, 721 (C.A. 2), certiorari denied, 382 U.S. 843; *United States* v. *Schipani*, 435 F. 2d 26, 27 (C.A. 2), certiorari denied, 401 U.S. 983; see also *United States* v. *Tucker*, 404 U.S. 443, 446-447; *Gardner* v. *Florida*, No. 74-6593, decided March 22, 1977. Nor was it improper for the trial court to give limited consideration to the two

[3]The remarks of the presiding judge from the bench were transcribed and are attached as an appendix to this memorandum, *infra*.

prior charges for which petitioner was not convicted. *Williams* v. *New York, supra*, 337 U.S. at 244; *United States* v. *Doyle, supra*, 348 F. 2d at 721; *United States* v. *Sweig*, 454 F. 2d 181, 184 (C.A. 2); *United States* v. *Cifarelli*, 401 F. 2d 512, 514 (C.A. 2), certiorari denied, 393 U.S. 987.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1977.

[4]Unlike *United States* v. *Malcolm*, 432 F. 2d 809 (C.A. 2), where the sentencing judge was under a misapprehension concerning the defendant's criminal record, or *United States* v. *Stein*, 544 F. 2d 96 (C.A. 2), where the sentence was also based upon factual misapprehensions by the court, this case does not involve reliance on concededly inaccurate information.

DOJ-1977-05

APPENDIX

(The following statement does not constitute a formal opinion of the court and is not to be reported. It shall not be cited or otherwise used in unrelated cases).

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LOUIS JAMES DESALVATORE, a/k/a
LOUIS PIZZA, ANTHONY FAGO, JOHN GIANGRANDE,
Defendants,

LOUIS JAMES DESALVATORE, a/k/a
LOUIS PIZZA,
Defendant-Appellant.

Docket No. 76-1515

Before:

HON. ANDERSON, OAKES and GURFEIN, Circuit Judges.

New York, N.Y.

January 26, 1977

Statement made by the Court at disposition of appeal in open court.

JUDGE OAKES:

Well, Mr. Meyer, you've done what you could with this, but we're going to affirm it from the bench. We think

the Court properly considered the total offense, so to speak, and not merely the single count on which he pleaded guilty. Our *Bernstein* case, we think, answers the point you make about the information gleaned elsewhere. I don't know whether cert has been denied in that case or not, yet, it may be overturned—who knows—but the prosecution certainly did not violate its agreement not to take a position by answering the statements made to the court on appellant's behalf. It was a good argument, but "no soap."